

It would seem clear to me that the respondent refuses to pay the balance of the purchase price unless the lands are transferred to her so that she can mortgage them to a bank to obtain a loan and settle the balance. In the event, she brought an action against the appellants claiming rescission of the written agreements. The only ground for her claim was that the appellants are in breach of an oral agreement which, she says, is collateral to the written agreements. That was her cause of action on the pleadings. The appellants' defence was a denial of the existence of the alleged oral agreement. If the case had been considered purely on the basis whether the respondent is entitled to rescind the written contracts the matter would have been concluded by the trial court's finding that the oral agreement did not exist. But the trial judge in this case went further to consider whether time was of the essence of the written contracts. On the evidence of the appellants' letter of January 13, 1965 giving the respondent three days within which to pay the first instalment and in the light of authorities cited, the trial judge took the view that time was not of the essence and proceeded to the conclusion that the respondent was entitled to rescind the contracts. With respect, I find it difficult to comprehend the logic of that conclusion. The respondent was not seeking specific performance as would make the question of time being of the essence relevant. Not being relevant it was pointless to consider whether there has been a waiver of the condition that time was of the essence. The only issue is whether the respondent is entitled to rescind the contract and treat herself as being discharged from all her obligations. As it seems to me neither in fact nor in law is there any ground on which an order of rescission could be granted. The authorities cited and discussed have no bearing whatsoever on the real issue before the court. I have no doubt that this case has been wrongly decided.

A few words on the order directing the appellants to refund the \$9,000. If the respondent cannot succeed on her main claim for rescission the whole action fails. Whether or not the appellants are entitled to forfeit the money is a different question altogether. The question did not arise for decision in these proceedings although a great deal was said about it in the course of counsel's arguments.

I shall be content to hold that this appeal be allowed and the judgment of the court below be set aside with costs here and below.

Appeal allowed.

Solicitors: *Sault, Thara & Co.; Atma Singh Gill & Co.*

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TIOH KOOI LAN v. ISMAILJEE

[F.C. (Azmi L.P., Suffian and Ali F.J.J.) October 19, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 41 of 1971]

Landlord and Tenant — Controlled premises — Part of the premises burnt down by fire — Affected parts repaired and wooden shutters replaced with new metal gates — Whether "premises" are "new" as completed after 31st January 1948 — Control of Rent Act, 1966, ss. 4(2)(a) and 18.

In this case the learned trial judge had dismissed the plaintiff's suit for possession on the ground that she had not discharged the onus of showing that there had been such radical structural alterations as to bring the premises within the meaning of "new premises".

Held: the appeal should be dismissed on the ground that on the facts of the case the plaintiff had failed to prove that the building was completed after January 31, 1948.

Seemle: the test applied by the learned trial judge, merely that a building though completed before January 31, 1948 but which has since that date been so fundamentally changed that it can no longer be said to exist and that another building has replaced it, is not correct.

Cases referred to:-

- (1) *Pritam Kaur v. Rajaratnam* [1970] 2 M.L.J. 109.
- (2) *Eastern Realty Co. Ltd. v. Chan Hua Seng* [1967] 2 M.L.J. 195.
- (3) *Success Enterprises Ltd. v. Eng Ah Boon* [1968] 1 M.L.J. 75.
- (4) *Kai Nam (a firm) v. Ma Kam Chan* [1950] A.C. 358.

FEDERAL COURT.

K. K. Lam for the appellant.

R. R. Chelliah (Iyadurai with him) for the respondent.

Azmi L.P.: We dismissed this appeal at the last hearing and as indicated then here are my grounds for dismissing the appeal.

This is an appeal against the judgment of Raja Azlan Shah J. He dismissed the claim of the plaintiff, the owner of premises known as 28 Station Road, Slim River, for a declaration, to put it briefly, that by reason of the destruction of the major portion of the premises by fire, and the same portion rebuilt, the premises ceased to be controlled premises.

The evidence would show that on 13th January 1967, the front and business portion of the building was burnt down by fire. The fire destroyed the roof and damaged the plastering of the party walls and the front wooden shutters. With the permission of the local council she replaced and repaired the affected parts at a cost of \$5,000. The wooden shutters were replaced with new metal gates. The rear part of the premises, where the tenant and his family lived, was unaffected by the fire, so that he continued to live there and never left the premises because of the destruction of the business portion.

The learned judge dismissed the plaintiff's suit on the ground that he was not satisfied that she had "discharged the burden placed on her of showing that there had been radical structural alterations so as to bring it within the meaning of 'new' premises." In deciding the question whether the premises had ceased to be controlled premises, he had applied the test ap-

parently, as he did in his previous judgment in *Pritam Kaur v. Rajaratnam*⁽¹⁾ that:—

"A building completed before 31st January 1948 but which has since that date been so fundamentally changed that it can no longer be said to exist and another has replaced it,"

ceased to be controlled premises.

I would be content to dismiss this appeal purely on the ground that on the facts of the case the plaintiff had failed to prove that this building was completed after 31st January 1948, within the meaning of the words in section 4(2) of the Control of Rent Act 1966. But we are asked, however, to say whether Raja Azlan Shah J. was right in laying down the test he made, namely, that a building though completed before 31st January 1948 but which has since that date been so fundamentally changed that it can no longer be said to exist and that another building has replaced it. I have some doubt myself whether in view of certain provisions of the Act that that test is a correct one. I found in section 9(1)(b) a reference to restoration, improvement or the making of structural alterations to controlled premises. Under that section if the landlord has in connection with such restoration, improvement or the making of structural alteration of the premises, incurred expenditure, not including expenditure on decoration or ordinary repairs, the fair rent of the premises may be increased to the extent which shall not exceed such sum as will allow him a reasonable return in respect of such expenditure. In other words, any structural alteration made to the premises merely gives the landlord a claim for increase in the fair rent.

There is also section 18. Under this section the landlord of any controlled premises who desires to effect or cause to be effected to his premises any development may apply for the recovery of the possession of the premises to the tribunal. To effect a development according to the definition of the word before it was amended on 11th July 1968, would be "to rebuild the premises and that would include structural alteration, extension or addition and the provision of additional fixture or fittings but does not include anything done by way of decoration or repair." Such application is to be supported by a plan for such development which has been approved by the local authority and evidence that funds are available for the purpose of putting into effect such development. He must also give a written undertaking that work for purpose of putting into effect such development will commence within three months of the day when he gets possession of the premises. The tribunal may make an order or refuse to make one but when it makes an order it must award to the tenant against whom the order is made a compensation to be assessed in a manner provided in sub-section 2 of that section. The tenant against whom such order is made must vacate such premises within a period mentioned in the sub-section and upon vacating the said premises any compensation previously deposited will be paid to him.

In the circumstances, I do not think that the test applied by the learned judge can be right because the question now devolves not only on the extent of the

structural change of the premises that has been made, but also as to whether any such structural change or rebuilding has been made in pursuance of the order of the tribunal under section 18.

Suffian F.J.: The question in this appeal is — are the premises No. 28 Station Road, Slim River, "buildings completed after the 31st day of January, 1948" within the meaning of section 4(2)(a) of the Control of Rent Act, 1966. If they are, then they are exempt from rent control. The landlady plaintiff says that they are. The tenant defendant says that they are not.

The learned trial judge gave judgment in favour of the tenant and the landlord has appealed against that decision.

It is to be noted that, for premises to be exempt from rent control under the Control of Rent Ordinance No. 2 of 1956 since replaced by the current 1966 Act, they had to be "new buildings, completed after the 31st day of January, 1948"; under the equivalent Singapore law considered in *Eastern Realty Co. Ltd. v. Chan Hua Seng*⁽²⁾ and in *Success Enterprises Co. Ltd. v. Eng Ah Boon*⁽³⁾ they have to be "any new building built or completed after [a given date]"; and under the law of Hongkong considered in *Kai Nam (a firm) v. Ma Kam Chan*⁽⁴⁾ they have to be "any entirely new building".

Our current rent control Act does not use the word "new" nor "entirely new". It says simply that among others "buildings completed after [the prescribed date]" are exempt from rent control.

With respect I agree with the learned trial judge's conclusion that the premises in question were not buildings completed after the 31st day of January, 1948, and that they were therefore subject to rent control.

The shophouse here, a single-storey building, one in a row of other shophouses, with the front used for serving customers, and the rear occupied by the tenant as living quarters, was originally completed before the prescribed date. The plaintiff bought it in 1960. The defendant was then a tenant of the building where he had been carrying on the business of a cloth merchant for 40 years. In February, 1967, the business portion (*i.e.*, the front) of the shop was destroyed by fire which left the rear portion intact. The plaintiff repaired the damaged portion. She replaced the roof, plastered the party walls and replaced the front wooden shutters with a collapsible steel gate.

Because of these repairs the plaintiff thought that she had constructed new premises after the prescribed date and that therefore the shop was no longer subject to rent control. She contends that the identity of the premises as rent-controlled premises was totally destroyed when the front portion was gutted by fire, or alternatively that the front portion is no longer, and only the rear portion is, subject to rent control. The learned judge said —

"Whether repairs to a particular building so as to transform it into a new premises is a question of degree depending on the facts. There must be some structural change more radical than mere improvements such as by way of repairs. That is the test to determine whether a new premises has come into being. Accessorial additions or alterations of

merely localised effect are not enough. There must be something fundamental transforming the general structural character of the house as an entire entity. That was said in *Shanon v. McMahon* ([1945] I.R. 332) which was referred to by Winslow J. in *Success Enterprises Ltd. v. Eng Ah Boon*. I have said to the same effect in *Pritam Kaur v. Rajaratnam*.

The learned judge concluded that on the facts in this case he was not satisfied that the plaintiff had discharged the burden placed on her of showing that there had been such radical structural alterations so as to make the shop new premises.

While agreeing with his conclusion I would say with respect that he relies too much on the test of the newness of the shophouse. Our statute no longer uses the word "new" and for my part I would prefer merely to ask the question: is this shophouse a building completed after 31st January, 1948. On the facts there is no doubt that it is not: it was completed before that date, and the nature and extent of the repairs effected have made no difference to the date of its original completion and have not extinguished the identity of the shophouse or of its front portion as rent-controlled premises.

I therefore dismissed this appeal with costs.

Ali F.J.: The dispute in this appeal turns on the question whether premises No. 28, Station Road, Slim River, is or is not rent-controlled premises. More particularly, the appellant, the owner, seeks a declaration to the effect that the premises ceased to be rent controlled when its front portion was burnt by fire; alternatively, she seeks a declaration that as a result of substantial alterations the front portion is now a new building which is not subject to the Control of Rent Act, 1966. Her contention in the main declaration is that the premises has lost its identity as rent-controlled premises, and the contention in the alternative declaration is that the front portion is a building completed after January 31, 1948 within the meaning of paragraph (a) of subsection (2) of section 4 of the 1966 Act.

Raja Azlan Shah J., who tried the action, dismissed the appellant's claim and this is an appeal from that decision. In his oral judgment the learned trial judge dealt with the question whether, as a result of the alteration to the front portion, the premises as a whole can now be regarded as a new premises. In his judgment his Lordship said he was not satisfied that the appellant has discharged the onus of showing that "there have been radical structural alterations so as to bring it within the meaning of new premises." I propose to consider this appeal on the basis of the appellant's contentions, earlier referred to.

The contention that the controlled premises ceased to be so when it lost its identity is not founded on any principle or authority. It can be rejected without much consideration. Whether or not a controlled premises ceases to be controlled is strictly a matter involving the construction of the relevant provisions of the Control of Rent Act, 1966. In this case, we are not concerned with the extreme case of the whole premises having been burnt down to the ground. The rear portion of the premises is still intact and the tenant is still in occupation. To get him out of possession

A the landlady must proceed either under section 16 or section 18 of the Act. She chose to treat him as a trespasser on the ground that the premises is no longer controlled premises because it has lost its identity. There is nothing in the Act to suggest that a controlled premises ceases to be so if it loses its identity. The contention clearly fails.

B The next contention is that the front portion is now a new building completed after January 31, 1948. This involves the consideration of the phrase "buildings completed after the 31st day of January, 1948" in paragraph (a) of subsection (2) of section 4 of the Act. In the case of *Pritam Kaur v. Rajaratnam and Anor.*⁽¹⁾ Raja Azlan Shah J., construing this phrase, said, *inter alia*, that "a building completed before 31st January 1948 but which has since that date been so fundamentally changed that it can no longer be said to exist and another building has replaced it" is a building within the meaning of the phrase. On page 110 his Lordship went on to say:

C "The test whether the old building was so substantially or fundamentally altered so as to become a 'new building' under the 1956 Ordinance or merely another 'building completed after 31st January 1948' under the 1966 Act remains the same."

D It is necessary to examine whether this is a correct statement of the law. In my respectful opinion, it is not. The view expressed by Raja Azlan Shah J. apparently followed that taken by the learned Chief Justice of Singapore, Wee Chong Jin, in *Eastern Realty Co., Ltd. v. Chan Hua Seng*⁽²⁾ the facts of which bear no comparison with the facts either in *Pritam Kaur's* case, *supra*, or with the facts of the present case. The question before the learned Chief Justice, Singapore, turned on the existence of two new buildings erected on the foundation of the original building which was controlled premises. This fact did not prevent the Singapore court from arriving at the conclusion that in the circumstances, the controlled premises must be regarded as having ceased to exist. Support for this view was found from the judgment of Lord Cohen in the Privy Council in the Hongkong case of *Kai Nam (a firm) v. Ma Kam Chan*.⁽⁴⁾ Both in the Hongkong and Singapore cases, the words "entirely new building" and "new building" as appearing, respectively, in the definition of the term "premises" of the statute of each country, fell to be construed. I express no opinion whether or not the test adopted in these two cases is the correct test.

E In the instant case, we are only considering the phrase "buildings completed after the 31st day of January, 1948" in paragraph (a) of subsection (2) of section 4 of the 1966 Act. As it appears to me there is nothing ambiguous in the words used. The phrase means what it says. The date "31st day of January, 1948" seems to be the factor for determining whether a building is or is not controlled premises. A building completed after the date must obviously be different from a building completed before. The operative word, I think, is "completed" which implies the date on which a premises, as defined in the Act, becomes reasonably fit for occupation. The materials used for making the building may be of any kind and it matters not whether they are new or old materials. In terms

thus stated, it may be argued, as the appellant is now arguing, that as the front portion became reasonably fit for occupation after January 31, 1948 it is outside the scope of the Act. The fallacy in the argument is that it overlooks the true meaning of the word "premises" as defined in the Act. In the case of a premises which has been let as a whole, as here, it is impossible to regard the front portion as being separate from the rest of the premises. It may be that the front portion now looks different in appearance, size or dimension, but the fact remains that it is still part of the controlled premises and would remain so unless there is anything in the Act which says otherwise. Before the fire and after the repairs and alterations to the front portion were completed the tenant remained in occupation and presumably paying the same rent as before. In other words, he was holding on to his tenancy regardless of what had happened. The fact that the appellant has terminated the tenancy by notice was in itself an admission that the contractual relationship of landlord and tenant in respect of the premises as a whole remained in existence even after the repairs and alterations to the front portion were completed. In my respectful opinion, the view as expressed by Raja Azlan Shah J. in *Pritam Kaur's case*, *supra*, and extended to the instant case cannot, on the facts, be sustained. Whether it can be, if the facts had been the same as in the *Eastern Realty Co. Ltd.'s case*, *supra*, or in the case of *Success Enterprises Ltd. v. Eng Ah Boon*⁽³⁾ is, I think, a question which will be considered when it arises. Therefore, although I agree with the conclusion in this case, I do not agree with the reasons for the conclusion.

Accordingly, this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: K. K. Lam & Co.; R. R. Chelliah Bros.

MAHAMAD BIN MAHAMAD SAID & ANOR. v. PERIANAYAGAM & ANOR.

[F.C. (Suffian, Ali and Ong Hock Sim F.JJ.) October 19, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 57 of 1971]

Damages — Quantum — Personal injuries — Reduction of sum awarded as being out of line with trend in reasonably comparable cases.

Practice and Procedure — Appeal — Competence of appellate court to interfere with quantum of damages awarded in the court below.

The appellants/defendants appealed against the quantum of damages awarded in favour of the respondent/plaintiff who suffered injuries in a road accident. The learned trial judge held the first defendant/respondent 2/3 to blame and the plaintiff/appellant 1/3 to blame for the accident. There was no appeal against this finding.

The learned judge awarded \$9,000 for general damages and \$250 for special damages. He took into account the facts of the case and the principle that general damages should be in line with a discernible upward trend of damages in reasonably comparable cases. He awarded \$3,000 for the fracture of the plaintiff's ankle bone and \$6,000 for the pain and suffering and loss of amenities for the fracture

A of the hip joint, his permanent disabilities and osteo-arthritis and the longer years of the plaintiff's suffering.

Held, allowing the appeal: (1) the award of general damages in this case was so out of line with the trend in reasonably comparable cases that it was competent for the Federal Court to interfere with it;

B (2) the learned judge should not have taken compensation for each of the two injuries suffered by the respondent separately and added them up at the end. The items are not separate heads of compensation. They are only aids at arriving at a fair and reasonable compensation. There is an element of overlapping when two or more injuries are suffered simultaneously;

(3) accordingly, therefore, the quantum of general damages was reduced from \$9,000 to \$6,000.

Cases referred to:-

- C (1) *Jag Singh v. Toong Fong Omnibus Co. Ltd.* [1964] M.L.J. 463.
- (2) *Chin Boon Keng v. Sri Jaya Transport Co. (P.T.M.) Ltd. & Anor.* [1965] 2 M.L.J. 239.
- (3) *Fletcher v. Autocar and Transporters Ltd.* [1968] 1 All E.R. 726, 733.

FEDERAL COURT.

D K. A. Menon for the appellant.

David Tay for the first respondent.

Second respondent absent and unrepresented.

Cur. Adv. Vult.

Suffian F.J. (delivering the judgment of the court):

E This is an appeal by defendants against the quantum of damages awarded by Yong J. in favour of the plaintiff who suffered injuries in a road accident. The defendants want the quantum reduced.

The accident happened on the night of 29th August, 1965, at about 12.15 a.m. at Campbell Road, Kuala Lumpur. The plaintiff was then riding pillion on a motor-cycle driven by a friend when it collided with a taxi driven by the first defendant and owned by a company, the second defendant. The learned trial judge held the first defendant 2/3 and the plaintiff 1/3 to blame for the accident, and there is no appeal against this finding.

G The plaintiff suffered two fractures: first, of his acetabulum with dislocation of the right hip joint and, secondly, of his right ankle. He was hospitalised from 29th August until 11th October, 1965, a period of nearly 1½ months, and after that he was treated as an outpatient for nearly two months. During these two periods he could not walk and had to use crutches.

H On 21st February, 1967, a specialist at the Government General Hospital who examined him found that the flexion of his right hip was possible only up to 90° and that there was limitation in the rotation of his right hip joint. He also found that the plaintiff's right ankle joint showed chronic swelling and limitation of dorsi flexion. The specialist thought that these disabilities were likely to be permanent and that there was a strong possibility of the plaintiff developing osteo-arthritis of his right hip joint.

I The plaintiff was 22 at the time of the accident. He was employed by the Local Defence Corps to load and unload, and also to do some clerical work. He had an English education, having passed Standard VI. Because of the accident he is not as efficient as he was